

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal Action
)	No. 13-10200-GAO
)	
DZHOKHAR A. TSARNAEV, also)	
known as Jahar Tsarni,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, April 8, 2015
8:58 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

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P R O C E E D I N G S

THE COURT: Okay. So I gave you my proposed answers.

MR. WEINREB: So the government has no quarrel with the Court's answers as far as they go, but we request that they go further. Actually, with respect to the first question, we'd be content just with the first sentence. And I don't know that it's actually necessary to repeat all the rest. We had a slightly different formulation of it we were going to propose, but it more or less means the same thing.

THE COURT: The next several paragraphs I've just taken directly from the previous instruction. I just thought it would be useful to give them the whole -- actually, it's still not the whole, but they have the text of the original instructions anyway, but I just thought it might be easier to just repeat the two elements.

MR. WEINREB: I mean, I think it's true that the instructions sometimes say "aid or abet" or "aid and abet" and I think they may be over-thinking it --

THE COURT: They are over-thinking it.

MR. WEINREB: But to simply reassure them that it's a single concept, the two words.

THE COURT: All right. Is that it on that?

MR. WEINREB: Yes.

THE COURT: So let's deal with that.

MS. CONRAD: Basically we agree. I was going to

1 propose to say, "The words aid and abet" -- "You shouldn't
2 focus on the definition of 'aid and abet' or 'aid or abet' but
3 on the elements of the offense, as I've instructed you," so I'm
4 fine with that. We actually agree.

5 MR. WEINREB: We have a proposed answer.

6 THE COURT: Okay.

7 MR. WEINREB: As for the answer to the second
8 question, however, we believe that the -- what is prompting
9 that question is confusion about the following: The theory of
10 the government's case and the theory of the indictment is that
11 the conspiracies to -- the three conspiracies, which are
12 bombing conspiracies, lasted until the last of the bombs were
13 thrown in Watertown on April 19th, but the only place in the
14 indictment in which that theory is spelled out is in the overt
15 act section.

16 That section was not given to the jury. And at the
17 time that the Court proposed not giving it to the jury, that
18 seemed a somewhat harmless omission to us, but it now appears
19 to us that it has confused them. In particular, if you look at
20 question -- this is a two-part question, and they seem -- what
21 seems to be concerning them is whether the death of Officer
22 Collier can be said to have resulted from the conspiracy, the
23 bombing conspiracy, and I believe that may be because they're
24 confused about whether the conspiracy charges allegations in
25 the indictment pertain only to the bombings that occurred at

1 the Boston Marathon as opposed to all the bombings in the case.
2 We believe had they had the overt acts it would have been clear
3 that the government's allegation spanned the entire length of
4 the bombing campaign that began on April 15th and concluded on
5 April 19th.

6 And so we have proposed this formulation:
7 Either -- we would propose either that they be given the overt
8 acts, or if it's less confusing, that they simply be informed
9 that the government alleges that the conspiracies lasted from
10 the dates that are alleged in the indictment that there were
11 overt acts committed in furtherance of it throughout its
12 length, and that one of those overt acts that is alleged to
13 have occurred in furtherance in the indictment was the death of
14 Officer Collier, or the killing of Officer Collier.

15 MS. CONRAD: May I? First of all, I wrote something
16 out too, although largely what the Court came up with is pretty
17 close to what -- and I would say actually better -- and I'm not
18 just saying that -- than what I came up with.

19 But first of all, in response to Mr. Weinreb's point,
20 I mean, we agreed the overt acts weren't going to the jury,
21 didn't go to the jury. The conspiracy the indictment alleges
22 from at least February 2013 up to and including on or about
23 April 19th. So the timeframe is alleged in the indictment and
24 there is no reason to send in the overt acts which are not
25 required that the government prove, many of which weren't the

1 subject of evidence at the trial, much less to focus and
2 highlight the allegation about Officer Collier.

3 The one thing I would say about what the Court has
4 proposed is that it should be, I would submit, that what they
5 must find in order to convict is the conspiracy charged in the
6 indictment. So it's not enough for them to determine the scope
7 of the conspiracy and the duration of the conspiracy. Because
8 I think what you have here actually is -- and I have a copy of
9 the *United States versus Morrow* and then a couple of other
10 First Circuit cases that I think are very applicable on the
11 issue of multiple-versus-single conspiracies.

12 Because I think on the evidence here the jury could
13 find -- and I think they should be instructed on that. I think
14 they could find on the evidence here either arguably the
15 government's theory that there was one single conspiracy, maybe
16 with respect to use of a weapon of mass destruction, not so
17 much as to bombing of a public place.

18 And one of the other things I was going to ask the
19 Court to instruct is that the conspiracy ends when its
20 objective is accomplished. So the government's evidence here,
21 as argued in the closing, was that after the Boston Marathon
22 bombing, Mr. Tsarnaev returned to his daily life and went about
23 his business, suggesting that the conspiracy had ended -- had
24 accomplished its purpose. And that after the pictures were on
25 TV, then they came up with this plan to build more bombs, to

1 murder Officer Collier and so forth. Those are two separate
2 conspiracies.

3 I understand one could say that the evidence is
4 capable of leading to either of those two conclusions, but if
5 it leads to the latter conclusion that there were two or more
6 separate conspiracies, then the government has not proved
7 beyond a reasonable doubt the charges in the indictment.

8 And I have a couple of cases with me, they're cited in
9 there, First Circuit cases having to do with, for example, a
10 conspiracy to rob where the evidence showed only that the
11 defendant conspired to commit one robbery but the indictment
12 charged conspiracy to commit a string of robberies. So the
13 other thing, in addition to -- that it ends when the purpose is
14 accomplished, I think I put in there that -- I put something in
15 there I think about multiple conspiracies.

16 The other thing I would say is that the death must be
17 in terms of "death resulting," that it must be within the scope
18 of the conspiracy. I realize I didn't object to this in the
19 Court's original instructions, but the Court's instruction on
20 death resulting from a conspiracy was that the death would not
21 have occurred but for the crime, which is the language from
22 *Burrage* when you're talking about a substantive offense.

23 But I think it's different when you're talking about a
24 conspiracy because you cannot be held liable for a death that
25 resulted sort of from the actions of a coconspirator if it was

1 not in furtherance of the original conspiracy. But the Court
2 did instruct them with respect to *Pinkerton*.

3 I'm not trying to overly complicate this but I think
4 the single multiple conspiracy point is an important one and I
5 think the conspiracy charged is an important one because as
6 much -- and I totally agree with the way the Court has laid
7 this out here, that they have to find the scope and what the
8 scope of the defendant's agreement was. But I think it has to
9 be somehow tied to what's charged in the indictment.

10 MR. WEINREB: May I respond?

11 So, your Honor, this is a single question separated by
12 a line. And the question begins by asking whether the
13 conspiracy pertains to a sequence of events over multiple days
14 or a distinctive end. But a conspiracy is an agreement. It
15 doesn't require any events to take place.

16 And so the question does not seem to be directed so
17 much to whether a conspiracy can last more than one day, which
18 is what the Court's answer is mostly focused on, but rather,
19 the events that may occur in the course of the conspiracy. And
20 it is undoubtedly focused on the "death results" because that
21 is the only -- since there were no overt acts given to the jury
22 to decide upon, the only event that they are required to
23 determine occurred that pertains to the conspiracy is whether
24 death resulted. So I think that it is fair for the government
25 to ask that the answer focus on the gravamen of the jury's

1 concern here.

2 The only way that -- it is unusual for a case to
3 charge that something -- an action resulted from the
4 conspiracy, but it is not unusual -- in fact, it's extremely
5 common to charge that acts were committed in furtherance of the
6 conspiracy. And in this case the government did, in fact,
7 charge that the death of Officer Collier -- we specifically
8 charged that that was an act in furtherance of the conspiracy.

9 That seems to embrace Ms. Conrad's concern that it
10 be -- that the death result not accidentally or simply by
11 coincidence from a conspiracy, but that it had been within the
12 scope of the conspiracy, it had been in furtherance of the
13 conspiracy.

14 I don't believe it's the case that the conspirators
15 must agree ahead of time that these deaths are part of the
16 object of the conspiracy. That is not what it means for
17 something to result from a conspiracy or from something to be
18 an act in furtherance of the conspiracy. They simply have to
19 agree on a -- to do something the law forbids, such as bombing
20 a place of public use, using a weapon of mass destruction. And
21 then various acts such as stealing a gun in order to arm
22 themselves for a continuing bombing campaign can be an act in
23 furtherance of the conspiracy.

24 So I think it would affirmatively mislead them to
25 suggest that these A, B, C and D events were acts that had to

1 be part of the agreement.

2 MS. CONRAD: Well --

3 MR. WEINREB: That's simply not true.

4 MS. CONRAD: -- I would agree with that last part, and
5 if I said that, I misspoke. I think the deaths have to result
6 from acts in furtherance of the original conspiracy. In other
7 words, you can't add another conspiracy on; it's got to be
8 within that scope. So that's what I meant to say.

9 But just this point about highlighting Officer
10 Collier, we really object --

11 THE COURT: No, I'm not going to do that.

12 MS. CONRAD: Okay.

13 THE COURT: So I think what I will add is a reminder
14 that -- I'll double-check it, but I think I can say -- your
15 proposal as the government alleges, I may say as the indictment
16 alleges in Counts 1, 6 and 11, conspiracies that span these
17 dates, and that their focus should be on a conspiracy as
18 alleged in the indictment. There are three. They may be the
19 same, they may be different. It's up to them. And leave it at
20 that, and otherwise use what I have.

21 But I'll draw their attention to the span that is
22 alleged in the indictment which takes -- I think partially
23 meets your point, it takes it through April 19th. But I'm not
24 going to get specific about details of any of the conspiracies.

25 MS. CONRAD: What about the point that it ends when

1 its purpose is accomplished?

2 THE COURT: I don't think so.

3 MR. WEINREB: Furthermore, your Honor, for the record,
4 we would -- we disagree with the characterization that the
5 government argued in any way that the conspiracy ended and then
6 a new one began. What the government argued was that
7 Mr. Tsarnaev went back to his former life in order to lay low,
8 essentially, and wait till the time was right for the next
9 bombings to occur.

10 MS. CONRAD: I just meant that the jury could
11 interpret the evidence that way, not that you argued it.

12 THE COURT: All right. Thank you.

13 COUNSEL IN UNISON: Thank you, your Honor.

14 (The proceedings adjourned at 9:11 a.m.)
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C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSE, RMR, CRR
Official Court Reporter

Date: 10/29/15